Ling King Mee v Moh Chu Teck

HIGH COURT (SIBU) — DIVORCE PETITION NO 4 OF 1993
STEVE LK SHIM J
10 JUNE 1993

Family Law *— Procedure — Application for ancillary relief — Application served outside four-day limit under r 61(1) of the Divorce & Matrimonial Rules 1980 — Whether r 61(1) applied to petitions made under Form 12 or Form 13 — Whether breach rendered proceedings void or curable irregularity — Divorce & Matrimonial Rules 1980 rr 61(1) & 102(1) — Rules of the High Court 1980 O 2*

Family Law *— Procedure — Children — Application for custody and maintenance — Whether court could deal with application prior to hearing petition for judicial separation — Law Reform (Marriage and Divorce) Act 1976 s 88(1)*

The petitioner applied for ancillary relief in respect of certain matters prayed for in the petition for judicial separation. At the hearing of the application, counsel for the respondent raised two preliminary objections as follows:

(i) the application for ancillary relief was served on the respondent beyond the four-day limit provided for under r 61(1) of the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules') and therefore should be set aside under r 102(1) of the Rules; and
(ii) the application for custody of the children should not be entertained at this stage prior to the hearing of the petition proper.

Held, dismissing the application:

(1) Although there was an obvious non-compliance with r 61(1), what had to be considered was whether the breach was fatal enough to render the proceedings void or one which was merely a curable irregularity. Based on the facts, the court was prepared to accept the explanation for the breach by counsel for the petitioner and hold that it was a mere irregularity which was curable under O 2 of the Rules of the High Court 1980 and one that was not calculated to mislead the respondent nor was his case prejudiced as a result. The respondent had also waived the irregularity by taking a 'fresh step' in the proceedings with knowledge of the same by filing affidavits disputing the merits of the application. Moreover, the preliminary objection was not made within a reasonable time.

(2) The court can deal with the petitioner's application for custody and maintenance of the children prior to hearing the petition for judicial separation, however due to the conflicting evidence of the affidavits of both parties it would not be prudent or proper to decide on the issue without the benefit of examining the parties and their witnesses, if any. There was also nothing to indicate that

A the application had to be heard with urgency and despatch as there was no suggestion that the children who were in the care and custody of the respondent, were in a desperate and intolerable situation. Moreover the petitioner seemed more concerned about the division or loss of certain properties alleged to be jointly owned by her and the respondent, rather than the fate of her children.

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[Bahasa Malaysia summary

Pempetisyen telah memohon untuk relief sampingan mengenai beberapa perkara yang dipohon di dalam petisyennya bagi pemisahan kehakiman. Pada pendengaran permohonan itu, peguambela responden telah membangkitkan dua bantahan permulaan seperti berikut:

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(i) permohonan untuk relief sampingan telah disampaikan kepada responden di luar hadmasa empat hari yang diperuntukkan di bawah k 61(1) Kaedah-Kaedah Prosiding Perceraian dan Hal Ehwal Suami Isteri 1980 ('Kaedah itu') dan oleh yang demikian haruslah diketepikan di bawah k 102(1) Kaedah itu;

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(2) permohonan untuk penjagaan anak tidak seharusnya dilayan pada peringkat ini sebelum pendengaran petisyen.

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Diputuskan, menolak permohonan itu:

(1) Walaupun terdapat ketidakpatuhan yang ketara dengan k 61(1) Kaedah itu, apa yang perlu dipertimbangkan adalah sama ada perlanggaran itu cukup serius sehingga menjadikan prosiding itu terbatal ataupun ianya hanya satu luar aturan yang boleh diperbaiki. Berdasarkan fakta kes, mahkamah bersedia menerima penjelasan peguambela pempetisyen tentang sebab-sebab perlanggaran tersebut dan memutuskan bahawa ianya adalah suatu luar aturan sahaja yang dapat diperbaiki di bawah A 2 Kaedah-Kaedah Mahkamah Tinggi 1980 dan perlanggaran tersebut tidak bertujuan untuk memperdayakan responden dan kesnya juga tidak dimudaratkan olehnya. Responden juga telah menepikan luar aturan itu dengan mengambil langkah baru (fresh step) di dalam prosiding dengan pengetahuan tentang pelanggaran tersebut apabila memfailkan afidavit-afidavit mempertikaikan merit permohonan ini. Lagipun, bantahan awal itu tidak dibuat dalam jangkamasa yang berpatutan.

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(2) Mahkamah boleh membicarakan permohonan pempetisyen untuk penjagaan dan nafkah anak-anak pada peringkat ini sebelum mendengar petisyen untuk pemisahan kehakiman, tetapi oleh kerana terdapat keterangan yang bercanggah di dalam afidavit kedua-dua belah pihak, adalah tidak berhemat atau betul untuk mahkamah membuat keputusan tentang isu tersebut tanpa faedah pemeriksaan pihak-pihak serta saksi-saksi mereka, jika ada. Tidak ada apa-apa yang menunjukkan bahawa permohonan ini harus

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didengar dengan segera memandangkan tidak ada sebarang saranan bahawa anak-anak di bawah jagaan responden berada dalam situasi yang terdesak dan azab. Tambahan pula, pempetisyen kelihatan lebih mementingkan pembahagian atau kehilangan harta tertentu yang dikatakan dimiliki bersesama olehnya dan responden, daripada nasib anak-anaknya.]

Cases referred to

1 *Soo Lina v Ngu Chu Chiong (Chong Oi Khium Irene, co-respondent)* [1992] 2 MLJ 870 (folld)
2 *Tan Sew Yok v Ng Keng Huat* [1989] 3 MLJ 381 (folld)
3 *Lee Yu Lan v Lim Thain Chye* [1984] 1 MLJ 56 (refd)
4 *Yap Kim Swee v Leong Hung Yin* [1989] 3 MLJ 55 (refd)
5 *Marina Nahulandran v Appiah Nahulandran & Anor* [1976] 1 MLJ 137 (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 88(1)
Divorce and Matrimonial Proceedings Rules 1980 r 61(1)

Lin Quak Hong (*Chong Brothers*) for the petitioner.
Belinda Hii (*Hii & Hii*) for the respondent.

Cur Adv Vult

Steve LK Shim J: In this case, the petitioner has applied by way of notice for ancillary relief (hereinafter referred to as 'the application') in respect of certain matters prayed for in the petition for judicial separation. At the outset and before hearing the merits of the application, Ms Belinda Hii, counsel for the respondent, has raised a number of preliminary objections.

First, she submits that under r 61(1) of the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules'), under which this application is apparently made, the petitioner must serve a copy of the application on the respondent within four days after the filing thereof. Rule 61(1) stipulates:

> A petitioner or respondent who has applied for ancillary relief in his petition or answer and who intends to proceed with the application before a registrar shall, subject to Rule 84, file a notice in Form 12 and within four days after doing so serve a copy on the other spouse.

She says that in this case, the application was filed on 6 January 1993 but it was only served on the respondent on 8 February 1993, well beyond the four-day limit provided for in r 61(1) above. She contends that as the said rule had not been complied with, the application should be set aside under r 102(1). In response, Mdm Lin, counsel for the petitioner submitted that as the petitioner has utilized Form 13 and not Form 12, the said rule does not apply because it refers specifically to Form 12. In this connection, I should perhaps refer to *Soo Lina v Ngu Chu Chiong (Chong Oi Khium Irene, co-respondent)*[1] which has briefly dealt with this issue. The relevant passage in the judgment therein reads [at p 874]:

> I do not think that it is disputed that the petitioner has applied for ancillary relief in her petition. In that event if she intends to proceed with her application, r 61(1) of the Rules requires her to file a notice in Form 12. However an examination of r 61(1) and (2) of the Rules and Form 12 would seem to show that Form 12 therein should in fact be Form 13. Form 12 relates to r 46(1) and (2) of the Rules and r 61(2) relates to Form 11 or 13 in respect of an application for ancillary relief. I am therefore of the opinion that in a situation where a petitioner has also applied for ancillary relief in her petition and who intends to proceed with the application, shall file a notice in Form 13.

It would seem that the learned judge in the above case was of the view that Form 12 referred to in r 61(1) should be Form 13 instead and that in an application under the said rule, the correct form was Form 13 and not Form 12. I am quite prepared to accept the same view. In the circumstances, r 61(1) is applicable in this case. There is therefore an obvious breach or non-compliance of the said rule by the petitioner since the application was served on the respondent's solicitors more than a month after it was filed with the court registry.

Having stated that, what has to be considered next is the question of whether the breach or non-compliance aforesaid is fatal enough to render the proceedings void or is merely a curable irregularity. This has to be looked at in the light of several factors. Here, Mdm Lin, for the petitioner, has explained that the delay was unavoidable because the relevant documents, after being submitted to the senior assistant registrar, were not returned to them in time to be served on the respondent or his solicitors; that attempts were made to serve them but were unsuccessful and that only later when they received a letter dated 8 February 1993 from Messrs Hii & Hii, solicitors for the respondent, informing them of their willingness to accept service of the petition for judicial separation, were they (the petitioner's solicitors) able to serve the application on the respondent through his solicitors. Ms Hii, for the respondent, has responded by saying that the petitioner and/or her solicitors should have drawn the senior assistant registrar's attention to the relevant rules, etc, and as they had not done so, they have no one but themselves to blame. Such a proposition is, of course, quite commendable but I am not sure it provides a complete solution. In any event, I am quite prepared to accept the explanation of Mdm Lin and hold that it is merely an irregularity and one which is not calculated to mislead the respondent nor do I think that the respondent's case has been prejudiced as a result. I am of the view that the irregularity is curable under O 2 of the Rules of the High Court 1980.

This brings me to the question of whether the respondent had taken any 'fresh step' in the proceedings which had the effect of waiving the irregularity in question. Now, the record shows that the application for ancillary relief was fixed for hearing on 13 February 1993 but on the said date, Ms Hii representing the respondent had applied for an adjournment of three months as she had just been engaged by the respondent and so needed time to examine the many allegations made by the petitioner and also that the respondent was in Bintulu at the time. Her request was granted and the case was adjourned to 17 May 1993. In the meanwhile, the respondent, obviously upon advice from his solicitors, proceeded to file several affidavits,

in answer. Mdm Lin has contended that the respondent's solicitors' failure to raise the relevant objection at the appropriate time on 13 February 1993 and the subsequent filing of the affidavits by the respondent opposing the application are to be construed as having taken a 'fresh step' in the proceedings with knowledge of the irregularity in question. Ms Hii has countered by stating that the circumstances only provided her, as the solicitors for the respondent, to object on 16 April 1993 at the hearing of this application. But what are the circumstances? The record shows that Messrs Hii & Hii, solicitors of the respondent, received the application on 8 February 1993 and the hearing date was 13 February 1993. As I have said earlier, Ms Hii had, on 13 February 1993, applied for adjournment for the reasons already stated. This is perhaps quite understandable because the time period was too short and she would have needed more time to study the application as well as the relevant rules pertaining thereto. However, it is, I think, reasonable to assume that by the time the respondent's affidavit in answer affirmed on 19 February 1993, was filed on 20 February 1993, Ms Hii, as solicitor for the respondent, would reasonably be expected to know of the irregularity in question and to take the appropriate steps to object or to apply to set aside the proceedings, but she did not. Instead, she proceeded to file in the respondent's affidavits disputing the merits of the application. This must clearly be regarded as taking a 'fresh step' in the proceedings with knowledge of the said irregularity and with a view either to resist the application on the merits or to obtain an advantage on costs. This has the effect of waiving the irregularity in question. Furthermore, I do not think that Ms Hii's request to have the application set aside, arising as it does in the course of her submission relating to the preliminary objections, is made within a reasonable time for the reasons already discussed. I must therefore reject the request accordingly.

Now, Ms Hii has also contended that the petitioner's prayer for custody of the children in the application ought not to be entertained by the court at this stage, prior to the hearing of the petition for judicial separation. She maintains that the definition of 'ancillary relief' in r 2 of the Rules does not include custody and therefore the petitioner is precluded from seeking such a relief in this application. Mdm Lin, has however submitted that such a relief is provided for under s 88(1) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') which stipulates thus:

> The court may *at any time* by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person. (Emphasis added.)

She has laid emphasis on the words 'at any time' above. Attention has also been drawn to r 76(1) which provides that application for custody of a child is to be made before a judge and by r 76(3), such application can be made either by summons or notice, as the case may be. In this connection, the case of *Tan Sew Yok v Ng Keng Huat*,[2] seems relevant. In that case, there was a petition for divorce but before the hearing of the said petition, the

petitioner applied for ancillary relief relating to custody of the infant of the marriage, maintenance for the child and an injunction against the respondent. This application was entertained by the High Court. It should be noted however that most of the other case authorities on the point seem to indicate that such application was dealt with by the court either at the time when the petition for divorce or judicial separation was heard or after the decree nisi was granted: see *Lee Yu Lan v Lim Thain Chye*;[3] *Yap Kim Swee v Leong Hung Yin*[4] and *Marina Nahulandran v Appiah Nahulandran & Anor.*[5] In any event, on the basis of the words 'at any time' in s 88(1) of the Act and the implication arising from *Tan Sew Yok*,[2] there is at least an arguable case that this court can deal with the petitioner's application for ancillary relief relating to custody of the children prior to hearing the petition for judicial separation. As regards the ancillary relief relating to maintenance prayed for by the petitioner in the application, there is no difficulty because the term 'ancillary relief', in its statutory definition, covers such a relief.

In view of the objections raised, Mdm Lin, upon reconsideration and in the course of her submission, has indicated that she would only proceed with prayers (1), (2), (7) and (8) of the application which relate to the issues of custody and maintenance of the children. She has decided to forgo the other prayers.

On the issues of custody and maintenance, there is conflicting evidence as disclosed in the various affidavits filed by the disputing parties. That being the case, I am not sure it would be proper and prudent to deal with them on the basis of such conflicting affidavit evidence without the benefit of examining and cross-examining the parties concerned and/or their witnesses, if any. Such issues must conceivably be related or relevant to the degree of culpability of the parents in their relationship with each other. As Siti Norma Yaakob J has said in *Yap Kim Swee*,[4] that in considering the claim for maintenance, regard must be had to the degree of responsibility that led to the breakdown of the marriage. In my view, the same must apply to the issue of custody. Here, there are disputes as to the proper social environment for the children concerned; the financial standing of the disputing parties; their ability to act as role models for the children, etc. There may even be a need to obtain welfare reports on the parents and on the children. Here, the petitioner has alleged that the respondent had forcibly removed the children from their matrimonial home and brought them to his parent's house in Sibu and that she was denied access to the children. The respondent has of course denied this. Such and other related issues are better ventilated at the trial of the petition for judicial separation. It is perhaps interesting to note that there is nothing to indicate or suggest that the children, now in the care and custody of the respondent, are in such a desperate and intolerable situation that this application has to be heard with urgency and despatch. Indeed, I do not detect in the affidavits of the petitioner that she is particularly worried or concerned about the present fate of her two children now in the custody of the respondent in Sibu as she is about the division or loss of certain properties alleged to be jointly owned by her and the respondent. The issues of custody and maintenance were

never mentioned in her affidavit in support of this application. Wherefor is the urgency?

Taking everything into consideration and for the reasons given, I do not think it prudent to entertain the application at this time. I feel that the issues of custody and maintenance should properly be dealt with at the hearing of the petition for judicial separation. Accordingly, this application is hereby dismissed. There will be no order as to costs.

Application dismissed.

Reported by Aslam Zainuddin